LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 17 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 530

ESTATE OF RUSSELL HARRISON VARIAN, Deceased, DOROTHY HILL VARIAN, Executrix,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PAUL E. ANDERSON
VALENTINE BROOKES
601 California Street
San Francisco, California 94108

RICHARD M. LEONARD
220 Bush Street
San Francisco, California 94104

Attorneys for Petitioner

KENT, BROOKES AND ANDERSON
LEONARD AND DOLE
San Francisco, California

Of Counsel

SUBJECT INDEX

	Page
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTION AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
I. Summary of Reasons Why Certiorari Should Be Granted	9
II. Denial of Due Process	10
III. Inclusion of Trusts for Minors	16
IV. Conflict with Chrysler Case	18
CONCLUSION	20
APPENDIX A	1-5
APPENDIX B	1-37
APPENDIX C	1-3

TABLE OF AUTHORITIES CITED

CASES

	Page
Commissioner v. Holmes' Estate, (1946) 326 U. S. 480	2, 17, 19
Commissioner v. Wemyss, (1945) 324 U. S. 303	2, 17,
Estate of Chrysler v. Commissioner (2nd Cir. 1966) 361 F. 2d 508	10, 18, 19, 20
Fondren v. Commissioner of Internal Revenue (1945) 324 U. S. 18	17
Kennedy Name Plate v. Commissioner, (9th Cir. 1948) 170 F. 2d 196.	14
Lober v. United States, (1953) 346 U. S. 355.	2, 5, 16, 17, 18, 19, 20
Merchants Nat. Bank v. Commissioner, (1943) 320 U. S. 256	5, 11
Universal Camera Corp. v. National Labor Relations Board, (1951) 340 U. S. 474.	13, 15

TABLE OF AUTHORITIES CITED

CASES

Page

Colorado Interstate Natural Gas Co. v. Federal Power Commission, (1945) 324 U.S. 581 19

Commissioner v. Wemyss, (1945) 324 U.S. 303 . . . . . 5, 17

Estate of Chrysler v. Commissioner, (2nd Cir. 1944) 140 F.2d 608 . . . . . 10, 18, 19, 20

Gregory v. Commissioner of Internal Revenue, (1935) 294 U.S. 18 17

Kennedy Nurse Corp. v. Commissioner, (9th Cir. 1944) 142 F.2d 198 14

Lucas v. United States, (1953) 346 U.S. 359 . . . . . 2, 5, 12, 17, 18, 19, 20

Merchants Nat. Bank v. Commissioner, (1943) 320 U.S. 256 . . . . . 5, 11

Universal Camera Corp. v. National Labor Relations Board, (1951) 340 U.S. 474 . . . . . 15, 16

TABLE OF AUTHORITIES CITED (Continued)

STATUTES

	Page
ADMINISTRATION PROCEDURES ACT, 5 U. S. C. A. §557(c).	11
INTERNAL REVENUE ACT OF 1928, Section 601, 45 Stat. 791 . . .	12
INTERNAL REVENUE CODE OF 1954	
Section 2038.	3, 5, 16
Section 2055.	3
Section 2503(c).	3, 4, 10 16, 17, 18, 19
Section 6213.	3
Section 6214.	3
Section 7441.	14
Section 7442.	3
Section 7453.	15
Section 7458.	12
Section 7459.	11
Section 7460.	3, 11, 12 17
Section 7482.	9
Section 7483.	9
UNIFORM GIFTS & MINORS ACT . .	19

TABLE OF AUTHORITIES CITED (Continued)

RULES

	Page
Court of Claims Rule 66	11
Fed. R. Civ. P. 52(a)	11, 13

MISCELLANEOUS

69 Cong. Record 704	12
Report of Senate Finance Committee, 70 Cong., First Sess. S. Rept. 960 .	12
Treasury Regulation § 25. 2503-3(b) . .	17

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. _____

ESTATE OF RUSSELL HARRISON VARIAN, DECEASED, DOROTHY HILL VARIAN, EXECUTRIX,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Estate of Russell Harrison Varian, Deceased, Dorothy Hill Varian, Executrix, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on June 21, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the Tax Court of the United

States and the dissenting opinion are reported at 47 T. C. 34 and are reproduced in Appendix B hereto. The opinion of the Court of Appeals for the Ninth Circuit is currently not officially reported. It is unofficially reported in 68-2 U. S. T. C. ¶12,542, and is reproduced in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals was made and entered on June 21, 1968. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Did the Tax Court deny petitioner due process of law when, after rejecting the uncontradicted testimony of petitioner's witnesses, it entered findings of fact contrary to the findings of the judge who actually conducted the hearing?

2. Should this Court's decision in Lober v. United States, (1953) 346 U. S. 355, be applied so as to create a different concept of completed gift to minors for estate tax purposes from that prevailing for gift tax purposes by virtue of Section 2503(c), Internal Revenue Code of 1954, in view of the settled rule of construction (Commissioner v. Wemyss, (1945) 324 U. S. 303) that the two taxes are in pari materia?

3. Should the estate tax consequences be identical when a parent makes a gift to his child by trust rather than under the Uniform

Gifts to Minors Act?

CONSTITUTION AND STATUTES INVOLVED

The constitutional provision involved is the Fifth Amendment to the Constitution of the United States. U. S. Const. Amend. V. The statutory provisions involved are the following sections of the Internal Revenue Code of 1954: Section 7460 (68A Stat. 887, 26 U. S. C. §7460); Section 2055 (68A Stat. 390, 26 U. S. C. §2055); Section 2038 (68A Stat. 383), 26 U. S. C. § 2038); Section 2503(c), (68A Stat. 405, 26 U. S. C. § 2503(c).

The above are reproduced in Appendix A, infra.

STATEMENT OF THE CASE

This is an estate tax case. Petitioner filed a timely petition for redetermination of estate taxes in the Tax Court (R-I. 1.) Jurisdiction of the Tax Court was invoked under Sections 7442, 6213, and 6214, Internal Revenue Code of 1954.

Russell Harrison Varian died testate on July 28, 1959, survived by his wife, Dorothy, and three minor children (R-I. 46-47.) On March 30, 1955, Russell and his wife created three identical trusts, one for the benefit of each of his three minor children. Each trust was administered by them as trustees; each was to continue only until the beneficiary became twenty-one years old or sooner died - at which time the trust estate was to be distributed to the beneficiary or, if deceased, to his

estate or appointee. (R-I. 53.) Each trust conformed to the provisions of Section 2503(c), Internal Revenue Code of 1954.

Each of the irrevocable trusts contained the following provisions relating to distribution of income and principal:

"3. Distribution of Income and Principal.

(a) The trustees shall pay to or apply for the benefit of the child such sums as may in the trustees' discretion be necessary for the child's support, maintenance and education.

(b) In the discretion of the trustees the principal and income or any portion thereof, may be payable to the child at any time before attaining the age of twenty-one years.

(c) To the extent not so expended, the remainder shall pass to and shall be distributed by the trustees to the child on attaining the age of twenty-one years.

(d) In the event the child dies before attaining the age of twenty-one years, the trust property and income therefrom shall be payable to the estate of the child, or as he may appoint under a general power of appointment." (R-I. 51.)

Because of these provisions, the Commissioner of Internal Revenue contended the

Varian Trusts were includible in the decedent's estate and the Tax Court, albeit reluctantly, agreed. Relying on Lober v. United States, (1953), 346 U. S. 335, the Tax Court held that the decedent, as trustee, retained the power to shift enjoyment of the trust property by exercising his fiduciary powers over trust income and principal; therefore, the trusts were includible in the decedent's estate under Section 2038(a)(1), Internal Revenue Code of 1954. (App. B. 16.) The Court of Appeals for the Ninth Circuit, in a per curiam decision, affirmed the Tax Court's decision. Infra, Appendix C.

The bulk of Russell's estate was left to five named trustees who were to administer the trust property for charity. The transfer to the charitable trustees was made subject to Article TEN (g) of Russell's will; this Article authorized the trustees to invade the charitable trust for the benefit of Russell's children, to the extent the trustees considered necessary, if the children became "burdened with catastrophic expenses relative to accident and illness" or if the children needed funds for their support and education while attending college. The amount available to all the children under this Article was One Hundred Thousand Dollars ($100,000). (R-I. 69.) The issue for decision in the Tax Court was whether the possibility of the children's invading the charitable trust was so remote as to be negligible. [1] (App. B. 22.)

A hearing on this question of fact was

[1] This question is one of fact. Merchants Nat. Bank v. Commissioner, (1943) 320 U.S. 256.

missioner, (1943) 320 U.S. 209.

held in San Francisco, California, and presided over by Tax Court Judge Pierce, sitting as a division of that court.

The evidence presented at the hearing showed that at decedent's death each of the children's trusts had a value in excess of Three hundred Thousand Dollars ($300,000), and that decedent's fifty-year old wife owned assets having a value of approximately Three Million Dollars ($3,000,000). (R-I. 70, 71.) Even though these amounts were available to the children, there remained the question under what circumstances would the trustees accede to invasion of the charitable trust.

To answer this question, three of the five trustees testified at the hearing. The essence of their uncontradicted testimony is as follows:

(1) The decedent's wife stated she would provide for all three children from a feeling of obligation and would not invade the charitable trust, if their own considerable resources were exhausted. (R-II. 36, 37, 38, 43, 44.)

(2) The trustees were required to take into account other resources available to the children for their education and for their emergency medical needs before they could invade the charitable trust. (R-II. 34, 36, 53, 54, 103-104, 110-111, 130-131.)

(3) The trustees acknowledged they would comply with their interpretation of California law in that the children must demonstrate

exhaustion of their own resources before the charitable trust would be invaded for their benefit. (R-II. 114, 133-134.)

(4) Furthermore, they testified that as trustees they had the duty under California law as they interpretated that law to apply the trust assets to charitable purposes as long as the children have other resources for education and for medical expenses. (R-II. 36, 53, 54, 110, 111, 131.)

(5) And finally, it was the trustees' opinion that the trustees would never exercise their power of invasion. (R-II. 46, 116, 132, 133.)

This hearing was held on April 5 and 6, 1965. On October 17, 1966, eighteen months later, Judge Tannenwald of the Tax Court filed the report of the Tax Court wherein the court held that the possibility of the children's invading the charitable trust was not so remote as to be negligible. Petitioner had had no hearing before Judge Tannenwald. In regard to the testimony of the trustees, Judge Tannenwald stated:

> "While we recognize that three of the five trustees of the charitable trust testified that they would construe paragraph (g) as authorizing the use of the charitable trust funds only as a last resort, we observe that such post-death statements obviously have a self-serving aura. 2/ We think that it would deny human nature

2/ There is nothing in the record to indicate that the trustees had any interest in the outcome of this case. Moreover, respondent never attempted to impeach these witnesses for bias or self-interest.

to accept without question the proposition that the income-producing funds of the charitable trust would not be the most likely source of the total availabilities for providing for the children's education and medical expenses, particularly if decedent's widow should die." (App. B. 25, 26.) (Footnote ours).

Judge Pierce, the judge who presided over and conducted the hearing, dissented from the Tax Court's decision in an opinion joined by two other judges. Judge Pierce believed that the possibility of invasion was so remote as to be negligible, and moreover, stated the following regarding the testimony of the trustees:

"In the instant case, I regarded the testimony of all the witnesses to be highly credible. I do not agree with the Court's suggestion that the testimony of the trustees of the charitable trust should be viewed as obviously having 'a self-serving aura'; and its further suggestion that 'the trustees would be more likely to accede to pressures to use the [charitable] funds for the benefit of the children.' To the contrary, I think the trustees testified with the higher motive of trying to be frank and helpful to the Court in expressing their views with respect to a situation with which they were especially well acquainted. I would have accorded substantial weight to the trustees' testimony, including their opinions that the possibility of

invasion was remote." (App. B. 34, 35.)

Thus, not only were Judge Tannenwald's findings of fact contrary to the findings of Judge Pierce, the judge who conducted the hearing, but these findings were premised on disbelief of the testimony of witnesses which the hearing judge found to be "highly credible."

Because of the constitutional issue raised by the procedure followed by the Tax Court, petitioner moved that the Tax Court vote to reconsider its decision and to enter a revised decision. (R-I. 94, 108.) The Tax Court denied these motions. (R-I. 112.) Furthermore, the findings of fact of the hearing judge were expressly excluded from the record.

Petitioner timely petitioned the Court of Appeals for the Ninth Circuit for review of the Tax Court's decision invoking its jurisdiction under Sections 7482 and 7483, Internal Revenue Code of 1954. (R-I. 116, 177.) Petitioner also moved to augment the record on review by including therein the findings of fact made by the judge who heard the case. The Court of Appeals, in a per curiam decision, affirmed the decision of the Tax Court and denied petitioner's motion. Infra, Appendix C.

REASONS FOR GRANTING THE WRIT

I. SUMMARY OF REASONS WHY CERTIORARI SHOULD BE GRANTED.

Petitioner believes that certiorari should

be granted in this case for the following reasons, and respectfully requests that the writ issue:

1. The Tax Court is the only federal tribunal or court which claims the power to discard the findings of fact of the trier of the facts, to enter findings of fact de novo, and to deny a hearing on the change in findings. This power raises a substantial question of due process of law under the Fifth Amendment to the Constitution and should be resolved by this Court in order to clarify proper judicial procedure before the Tax Court and to ensure litigants in that court their rights before it.

2. The question whethere or not trusts for minors created persuant to Section 2503 (c), Internal Revenue Code of 1954, which terminate on the expiration of the period of legal disability should be included in the estate of a grantor-trustee has not heretofore been reviewed by this Court. Because of the importance of this question, not only to trusts for minors, but also to guardianships and custodians for minors, this Court should review the question of includibility.

3. The decision below on the question of includibility of the minor's trusts is in conflict with the decision of the Court of Appeals for the Second Circuit in Estate of Chrysler v. Commissioner, (2nd Cir. 1966), 361 F. 2d 508.

II. DENIAL OF DUE PROCESS.

This case presents an important question in the administration of the tax laws. It

relates to the procedures followed by the Tax Court, where most of the tax cases are tried, in determining questions of fact. Petitioner believes this to be a matter of first impression as petitioner has found no case in which a court has resolved the constitutional issue presented by judges who have not heard the witnesses overturning the findings on credibility of the judge who had. But it is clear that the procedure followed by the Tax Court, and approved by the court below, would not be permitted in any other United States court or body which conducts a hearing and makes initial findings of fact. See Fed. R. Civ. P. 52(a), Court of Claims Rule 66, and 5 U. S. C. A. §557(c). Consequently, this procedure is foreign to the established federal concept of due process of law.

The question of the possibility of an invasion of the charitable trust on behalf of the children is a question of fact. Merchants Nat. Bank v. Commissioner, (1943) 320 U.S. 256. The court below held the Tax Court's procedure in deciding this question of fact was proper under Sections 7459 and 7460, Internal Revenue Code of 1954, thereby implying that Congress has given the Tax Court the power to make findings of fact de novo based on a cold record, disagreeing with the credibility finding of the only judge who heard the witnesses, while denying the parties a hearing before that fact-finding body.

(a) First, the statute was misunderstood below. The existence of such a power in a body deciding judicial questions is foreign to federal jurisprudence, and such power should

not be presumed but should be found only if granted in clear, unequivocal terms. This power is not unequivocally set out in Section 7460(b), Internal Revenue Code of 1954; all that Section 7460(b) provides is that the Tax Court has the power to "review" a hearing judge's "report". While this statute gives the Tax Court the power to "review" findings of fact, it certainly does not clearly empower the Tax Court to make findings of fact de novo. Though the legislative history of Section 7460(b) [Section 601, Internal Revenue Act of 1928, 45 Stat. 791] is not definitive, it does indicate that review by the Tax Court of a trial division's findings was granted by Congress only to insure uniformity of decision by the Tax Court on questions of law. See Report Senate Finance Committee, 70th Cong., First Sess., S. Rept. 960, pp. 37, 38, and Statements of Mr. Green of House Ways and Means Committee, 69 Cong. Record 704. Thus Congress had not intended to grant to the Tax Court when sitting en banc as a reviewing body the plenary power to make findings of fact de novo.

Second, and consistent with the fact that Congress did not intend the Tax Court to have such broad power, is the fact that Congress specifically denied the disputing parties the right to a hearing before the Tax Court on a reviewed report. Internal Revenue Code of 1954, Section 7458. If Congress had intended the Tax Court to have the power to render findings of fact de novo, it certainly would have granted the parties the right to a hearing before the full Tax Court just as in all other federal proceedings where a hearing is guaranteed before the tribunal reviewing the facts. For these reasons,

it is clear that Congress did not grant the Tax Court the power to make findings of fact contrary to the findings of the judge who heard the evidence when such substituted findings are premised on the rejection of uncontradicted testimony found to be highly credible by the hearing judge.

(b) Even if the Tax Court was proceeding within the scope of its statutory powers, the exercise of those powers in this case denied petitioner due process of law as guaranteed him under the Fifth Amendment to the Constitution.

Clearly, petitioner would be denied due process of law if a non-hearing judge entered findings of fact de novo in either the United States District Court or the United States Court of Claims. In true court proceedings, fairness to the litigants requires that findings of fact by the one who heard the evidence shall not be overturned on review or otherwise unless they are "clearly erroneous." 3/ See Fed. R. Civ. P. 52(a). To avoid this rule, it has been contended that the Tax Court is not a true court but rather an administrative agency with the result that the Tax Court's procedures are to be measured by less than the minimal due process requirements ordinarily applied to administrative agencies. This contention is based entirely on the fact that Congress chose to call the Tax Court "an independent agency in the Executive Branch of the

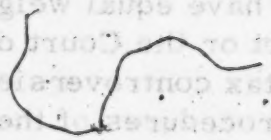
---

3/ The Court of Appeals for the Ninth Circuit applied the "clearly erroneous" test of review to the findings of fact of the Tax Court in this case despite the admitted fact that those findings were contrary to those of the hearing judge. This result is in direct conflict with Universal Camera Corp. v. National Labor Relations Board, (1951), 340 U.S. 474, 497.

Government." Section 7441, Internal Revenue Code of 1954.

Admittedly, the Tax Court is not a constitutional court, but neither is it a true administrative agency. Substance must prevail over form, and calling a body an administrative agency does not make it one. The Tax Court is not a true administrative agency because it is not bound by the Administrative Procedure Act. Kennedy Name Plate v. Commissioner, (9th Cir. 1948) 170 F. 2d 196. It does not make "institutional decisions"; it does not decide questions of policy under broad statutory guidelines, e. g., "unfair labor practices", "public convenience and necessity", etc.; and it is not a mandatory step within the doctrine of exhaustion of administrative remedies.

In fact, the Tax Court is more like a constitutional court than an administrative agency. Its decisions are given all the impact on litigants that accompany those of a constitutional court. They come from a body named "Court", rendered by an official titled "Judge". The Tax Court decides questions of law and fact in a case or controversy under the Internal Revenue Code, clearly a judicial act. Its decisions have equal weight with those of a District Court or the Court of Claims as initial decisions in tax controversies. And, generally, the procedures of the Tax Court are those of a constitutional court, e. g., pleadings, briefs, motions, etc. Unlike an administrative agency, it must follow the rules of evidence: viz; those of the United States District Court for the District of Columbia sitting without



a jury. Internal Revenue Code of 1954, Section 7453. For these reasons, the Tax Court is more like a true court, irrespective of what it is called.

Because the Tax Court resembles a true court, the due process of law which applies to the proceedings of a true court should also apply to the proceedings of the Tax Court. This Court should therefore decide whether the procedure followed by the Tax Court in this case measures up to the requisite fairness included in the concept of due process of law.

Finally, the decision below conflicts with Universal Camera Corp. v. National Labor Relations Board, (1951) 340 U. S. 474, if the Tax Court is viewed as an administrative body. In rejecting both the hearing judge's findings of fact and his conclusions regarding the credibility of the witnesses, the Tax Court effectively denied petitioner due process of law. In the Universal Camera case, this Court reversed a decision enforcing an order of the Board based upon its findings of fact which in part were in conflict with the facts found by the trial examiner. The court of appeals had held those findings to be binding on it despite the conflict. In reversing, this Court noted that on review of a Board finding the reviewing tribunal must take into account the fact that the trial examiner had an opportunity to observe the witnesses he hears and sees and the Board does not. It then directed the court of appeals on remand to ". . . accord the findings of the trial examiner the relevance that they reasonably command in answering the comprehensive question whether the evidence supporting the Board's

order is substantial." 340 U. S. at 497. 4/

Because the court below permitted the full Tax Court to disregard the findings of the trial judge, its decision should be reviewed and reversed.

III. INCLUSION OF TRUSTS FOR MINORS.

An important question in the administration of the estate and gift tax laws which this Court should clarify is whether a gift to minors, made in a manner to be a completed gift to satisfy the requirements of 1954 Internal Revenue Code Section 2503(c), is an incomplete transfer for the purposes of Section 2038 of the same code.

Section 2503(c), in recognition of the legal infirmities of minors to hold and manage property, makes an exception limited to gifts to minors in determining whether a gift in trust with reserved powers is a gift of a present interest. The children's trusts herein did satisfy the requirements of Section 2503(c), and accordingly were treated as completed gifts of present interests under the gift tax law.

The Tax Court, however, relying on the decision of this Court in Lober v. United States, (1953) 346 U. S. 335, held that the transfers were not present, completed transfers for estate tax purposes. The Lober case did not

---

4/ Because such a standard is not set forth in the Administrative Procedure Act, it must be grounded on this Court's concept of procedural due process of law.

present this issue, since the transfers there did not qualify as present transfers under Section 2503(c). Neither it nor any other Congressional definition of a present, complete gift could have been involved. The same distinction applies to Commissioner v. Holmes' Estate, (1947) 326 U. S. 480.

The effect of Section 2503(c) is that the minor is deemed to have "an unrestricted right to the immediate use, possession or enjoyment of property". Treas. Reg. § 25. 2503-3(b); see also Fondren v. Commissioner of Internal Revenue (1945) 324 U. S. 18, which is the evident inspiration of the quoted language. Because the decedent's children possessed this "unrestricted right", the decedent, as trustee, did not possess Mr. Lober's "power to change the terms as to the date his gift would be wholly effective." Lober v. United States, (1953) 346 U. S. 335, 337.

A premise for interpretation of these complementary tax statutes is that they are in pari materia and should wherever possible be construed alike. Commissioner v. Wemyss, (1945) 324 U. S. 303. Unless some explanation for a distinction in treatment appears, Congress should not be assumed to have adopted different tests for determining what qualifies as a present transfer in these two complementary taxes.

The Lober case is distinguishable, even if different tests existed. There the trusts were not to terminate until the beneficiaries reached 25, so they could not have qualified under Section 2503(c) had that

present this issue, since the transfers there did not qualify as present transfers under Section 2503(c). Neither it nor any other Congressional definition of a present complete gift could have been involved. The same distinction applies to Commissioner v. Holmes' Estate, (1947) 326 U.S. 480.

The effect of Section 2503(c) is that the donor is deemed to have an unrestricted right to the immediate use, possession or enjoyment of property. Treas. Reg. §25.2503-3(a). See Van Fossan v. Commissioner of Internal Revenue (1943) 321 U.S. 18, which is the evident source of the quoted language. There the decedent's children possessed this unrestricted right; the decedent, as trustee, did not possess Mr. Lober's power to change the terms as to how his gift would be finally effective. Lober v. United States, (1953) 346 U.S. 335, 337.

A premise for interpretation of these complementary tax statutes is that they are to be construed alike. Commissioner v. Wemyss, (1945) 324 U.S. 303. Unless some explanation for a distinction is apparent appears, Congress should not be assumed to have adopted different tests for determining what qualifies as a present transfer under these two complementary taxes.

The Lober case is distinguishable, even if different tests existed. There the trusts were not to terminate until the beneficiaries reached 25, so they could not have qualified under Section 2503(c) had that

provision then been law. Further, unlike Lober this case presents no possibility of a reverter since here, in careful compliance with Section 2503(c)(2)(B) the trust instrument provided for disposition if the minor predeceased twenty-one, such disposition to be as the minor provided either in his will or in general power of appointment. Acceleration could not, then, unlike Lober; have changed the ultimate recipient.

IV. CONFLICT WITH CHRYSLER CASE.

The decision of the court below conflicts in principle with the decision of the Court of Appeals for the Second Circuit in Estate of Chrysler v. Commissioner of Internal Revenue, (2nd Cir. 1966) 361 F. 2d 508, reversing (1965) 44 T. C. 55. The effect of this conflict is to place a premium on the form and manner in which a parent gives property to his minor children. Furthermore, the result of these two decisions is that undue weight is accorded the formalities of the transaction and therefore represents a trap for the unwary. This Court should resolve this conflict and settle the issue herein presented.

As stated above the decedent herein created and administered trusts for his minor children, which trusts were to terminate when the child reached age twenty-one. As trustee, the decedent retained the power to accumulate or distribute income and principal to his minor children. The court below found that possession of these powers necessitated inclusion of the trust assets in the estate of the decedent.

In Estate of Chrysler v. Commissioner, supra, the decedent held property he had given his children as custodian under Article 8-A of the Personal Property Law of New York known as the Model Gifts of Securities to Minors Act. As custodian, the decedent's statutory powers over the property were fiduciary powers. As described in the government's brief in the Tax Court in that case (44 T. C. 55, 69), they were identical to the powers possessed by Russell Varian as Trustee of his children's trusts. The Court of Appeals for the Second Circuit held that the property "registered in the name of decedent as custodian for his minor children should not have been included in his gross estate." 361 F. 2d at 511. In so holding, the Court of Appeals for the Second Circuit reversed the decision of the Tax Court. It is of note that the Tax Court's holding there, like that here, was based on this Court's decision in Commissioner v. Holmes' Estate, (1946) 326 U. S. 480 and Lober v. United States, (1953) 346 U. S. 335.

Thus, if a parent gives property to his minor children, and, as custodian under the Uniform Gifts to Minors Act, retains the power to accumulate or distribute income and principal until the child reaches age twenty-one, the property will not be included in the parent's estate. On the other hand, if a parent creates a trust for the benefit of his minor children, and, as trustee, retains the power to accumulate or distribute income and principal until the child reaches age twenty-one, the property will be included in the parent's estate. The gift taxes consequences of these transactions are identical under Section 2503(c), Internal

Revenue Code of 1954. Clearly, then, the legal effect of these transactions should be under the Estate Tax law for in each case the minor child's "present economic benefit" and the decedent's "power to change the terms as to the date his gift would be wholly effective" are identical. Lober v. United States, (1953) 346 U.S. 335, 337.

As the circumstances in the case at bar are substantially the same as those in Estate of Chrysler v. Commissioner, supra, and because the decision of the court below conflicts in principle with that decision, this Court should grant this Petition in order to resolve the conflict presented.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

DATED: September 13, 1968.

Respectfully submitted,

PAUL E. ANDERSON

VALENTINE BROOKES
601 California Street
San Francisco, California 94108

RICHARD M. LEONARD
220 Bush Street
San Francisco, California 94104

of Counsel:

KENT, BROOKES AND ANDERSON
LEONARD AND DOLE
San Francisco, California